

1 SAN DIEGO, CALIFORNIA - WEDNESDAY, JUNE 14, 2017

2 2:00 P.M.

3 THE COURT: GOOD AFTERNOON, EVERYONE.

4 MS. PEARCE: GOOD AFTERNOON, YOUR HONOR.

5 MR. KAUFMAN: GOOD AFTERNOON, YOUR HONOR.

6 THE CLERK: CALLING MATTER NO. 2, 14CV2062-MMA(AGS),
7 BRANCA VERSUS NORDSTROM, INC., SET FOR DISCOVERY HEARING.

8 IF THE PARTIES CAN PLEASE STATE THEIR APPEARANCE FOR
9 THE RECORD.

10 MR. KAUFMAN: ON BEHALF OF THE PLAINTIFF, AVI
11 KAUFMAN.

12 MS. PEARCE: ON BEHALF OF DEFENDANT, SHANNA
13 PEARCE.

14 THE COURT: ALL RIGHT. THANK YOU FOR BEING HERE BY
15 TELEPHONE, MR. KAUFMAN, AND IN PERSON, MS. PEARCE.

16 I WILL START OFF BY GIVING THE PARTIES MY
17 PRELIMINARY THOUGHTS ON THE CASE. THESE WOULD ONLY BE
18 TENTATIVE RULINGS. I'D BE HAPPY TO HEAR ARGUMENT FROM
19 EVERYONE.

20 WITH REGARD TO THE PROCEDURAL ISSUES THAT HAVE BEEN
21 RAISED BY THE PARTIES, IT DOES APPEAR THAT THE PLAINTIFF'S
22 RESPONSES WERE LATE AND UNVERIFIED, AND THERE DOES NOT APPEAR
23 TO BE GOOD CAUSE BASED ON THIS RECORD. SO ON THAT BASIS, I
24 COULD GRANT THE MOTION OUTRIGHT.

25 I WOULD POINT OUT THAT THE VERIFICATION APPEARS TO

1 STILL BE DEFICIENT, IN THAT UNDER RULE 33(B), IT'S REQUIRED
2 THAT THEY NOTARIZE OR VERIFY NOT ONLY THE IDENTITY OF THE
3 SIGNATORY BUT ALSO THE TRUTH OF THE RESPONSES.

4 AND IN THIS CASE, IT APPEARS THAT, BELATEDLY, THE
5 IDENTITY OF THE SIGNATORY WAS NOTARIZED BUT NOT THE TRUTH OF
6 THE RESPONSES. SO AS I SAID, ON THIS BASIS I COULD GRANT THE
7 MOTION OUTRIGHT I THINK ON THAT PROCEDURAL GROUND.

8 PLAINTIFF ALSO RAISES A PROCEDURAL OBSTACLE HERE,
9 WHICH IS THAT NORDSTROM FAILED TO MEANINGFULLY MEET AND
10 CONFER ABOUT THIS DISPUTE BEFORE BRINGING IT TO THE COURT'S
11 ATTENTION.

12 THE PARTIES HAVE DIFFERING VIEWS ABOUT THE EXTENT TO
13 WHICH THEY DID DISCUSS THIS DISPUTE, BUT WHAT SEEMS
14 COMPELLING TO THE COURT IS THAT NONE OF THE EXCHANGES THAT
15 HAVE BEEN BROUGHT TO MY ATTENTION WOULD QUALIFY AS
16 MEET-AND-CONFER EFFORTS UNDER OUR LOCAL RULES.

17 THE LOCAL RULES CONTEMPLATE A VERBAL MEETING, NOT AN
18 EXCHANGE OF LETTERS OR E-MAILS. UNDER CIVIL LOCAL RULE
19 26.1(A), IT STATES THAT IF COUNSEL HAVE OFFICES IN THE SAME
20 COUNTY, THEY ARE TO MEET IN PERSON. IF COUNSEL HAVE OFFICES
21 IN DIFFERENT COUNTIES, THEY ARE TO CONFER BY TELEPHONE.
22 UNDER NO CIRCUMSTANCES MAY THE PARTIES SATISFY THE
23 MEET-AND-CONFER REQUIREMENT BY EXCHANGING WRITTEN
24 CORRESPONDENCE.

25 AND IT APPEARS, BASED ON WHAT I HAVE BEEN PRESENTED,

1 THAT THE MEET-AND-CONFER EFFORTS WERE DONE -- TO THE EXTENT
2 THAT THEY WERE ATTEMPTED, THEY WERE DONE THROUGH WRITTEN
3 CORRESPONDENCE, NOT THROUGH VERBAL EXCHANGES. SO ON THIS
4 BASIS, SUBJECT TO THE GOOD CAUSE EXCEPTION, I COULD DENY THE
5 MOTION OUTRIGHT.

6 SO SINCE THE PARTIES HAVE DUELING PROCEDURAL
7 DEFICIENCIES THAT COULD DOOM THEIR CASES, I WILL PROCEED TO
8 THE MERITS AND GIVE YOU MY THOUGHTS ON THE MERITS, BUT I
9 CERTAINLY AM INTERESTED IN THE PARTIES' THOUGHTS ON THE
10 PROCEDURAL HURDLES AS WELL.

11 STARTING FIRST WITH INTERROGATORIES 2, 3, 4, 11, 12
12 AND 16. INTERROGATORY 2 REQUESTS PLAINTIFF'S NORDSTROM'S
13 PURCHASES. INTERROGATORY 3 REQUESTS PRICE TAGS.
14 INTERROGATORY 4 REQUESTS PRICE DISCOUNTS ABOVE OR ADJACENT TO
15 THE ITEMS PURCHASED.

16 INTERROGATORIES 11 AND 12 DEAL WITH PURCHASE HISTORY
17 AT NON-NORDSTROM RETAILERS OF ITEMS OF THE SAME BRAND AS
18 THOSE PURCHASED FROM NORDSTROM. AND INTERROGATORY 16 PERTAINS
19 TO RETURN INFORMATION FOR NORDSTROM PURCHASES.

20 IT APPEARS TO ME THAT INTERROGATORIES 2, 3, 4 AND
21 16, PLAINTIFF WOULD BE REQUIRED TO SUPPLEMENT RESPONSES --
22 THE RESPONSES AND STATE THAT THERE ARE NO RETURNS OR NO OTHER
23 ADS, IF THAT'S THE CASE. PLAINTIFF'S COUNSEL'S
24 REPRESENTATIONS SIMPLY ARE INSUFFICIENT AND WOULD HAVE TO
25 APPROPRIATELY VERIFY ALL OF THAT CORRECTLY UNDER RULE 33(B).

1 THE RULES EXPLICITLY PERMIT RAW DATA OR BUSINESS
2 RECORDS TO REPLACE INTERROGATORY ANSWERS. SO THERE IS
3 NOTHING IMPROPER ABOUT PRODUCING THAT RAW DATA RATHER THAN
4 GIVING INTERROGATORY ANSWERS.

5 IT IS TROUBLING, IF THE ALLEGATION IS TRUE, THAT
6 PLAINTIFF PROMISED A FULL INVENTORY AND INSTEAD GAVE A RAW
7 DATA DUMP. AND THAT'S NOT SOMETHING THE COURT CONDONES. BUT
8 UNDER THE RULES, LOOKING PURELY AT THE DISCOVERY QUESTION,
9 THERE IS NOTHING WRONG WITH PRODUCING RAW DATA RATHER THAN
10 INTERROGATORY ANSWERS.

11 TURNING TO INTERROGATORIES 11 AND 12, I TENTATIVELY
12 WOULD FIND THAT -- LOOKING TO THE MERITS HERE, THAT THOSE
13 NEED TO BE ANSWERED. IF PLAINTIFF HAS BEEN BUYING SIMILAR OR
14 IDENTICAL PRODUCTS FROM OTHER OUTLETS AT SIMILAR PRICES, THEN
15 THE CLAIM THAT PLAINTIFF WAS DECEIVED BY NORDSTROM'S PRICING
16 POLICIES WOULD BE LESS LIKELY. THEREFORE, THIS INFORMATION
17 WOULD BE RELEVANT TO NORDSTROM'S DEFENSE.

18 TURNING NOW TO INTERROGATORIES 5, 6, 7, 9 AND 10.
19 INTERROGATORY 5 REQUESTS PLAINTIFF TO GIVE THE VALUE OF THE
20 ITEMS HE PURCHASED IF IT IS DIFFERENT THAN THE PURCHASE
21 PRICE. INTERROGATORY 6 REQUESTS THE APPROPRIATE COMPARE AT
22 PRICES. INTERROGATORY 7 REQUESTS THE BASES FOR HIS
23 APPROPRIATE "COMPARE AT" PRICES. INTERROGATORY 9 REQUESTS
24 WHAT PLAINTIFF BELIEVES REASONABLE CONSUMERS THINK COMPARE AT
25 PRICES MEAN. AND INTERROGATORY 10 REQUESTS THE BASES FOR

1 THAT BELIEF.

2 DEFENDANT I BELIEVE IS CORRECT THAT PLAINTIFF FAILED
3 TO RESPOND ADEQUATELY TO THESE INTERROGATORIES, BUT I WOULD
4 TENTATIVELY FIND THAT THE QUESTIONS THEMSELVES ARE IMPROPER.
5 IT APPEARS THAT THE QUESTIONS ARE NOT RELEVANT AND THAT THEY
6 DO REQUEST EXPERT TESTIMONY AS TO VALUATION AND REASONABLE
7 CONSUMER BEHAVIOR. SO LOOKING TO THE MERITS OF THOSE, I
8 WOULD TENTATIVELY DENY THE REQUEST FOR SUPPLEMENTATION.

9 THE ISSUE TURNS A LITTLE DIFFERENTLY WITH REGARD TO
10 REQUESTS FOR PRODUCTION 10, 11, 13, 14 AND 19 THROUGH 23.

11 FOR THE RECORD, THOSE ARE IDENTIFIED AS FOLLOWS:
12 REQUEST FOR PRODUCTION 10, 11, 13 AND 14 SEEK DOCUMENTS
13 SUPPORTING PLAINTIFF'S CONTENTIONS THAT "COMPARE AT" PRICES
14 AND PERCENTAGE SAVINGS PRICES WERE DECEPTIVE OR INACCURATE.

15 REQUEST FOR PRODUCTIONS 19 AND 20 SEEK DOCUMENTS
16 CONCERNING PLAINTIFF'S CONTENTIONS CONCERNING REASONABLE
17 CONSUMERS' UNDERSTANDING OF COMPARE AT PRICES AND DOCUMENTS
18 SUPPORTING PLAINTIFF'S CONTENTION THAT HE MEETS THE
19 REQUIREMENTS FOR CLASS CERTIFICATION.

20 AND REQUEST FOR PRODUCTION 21, 22 AND 23 ASKS FOR
21 ARTICLES, SURVEYS, STUDIES AND RESEARCH THAT PLAINTIFF WILL
22 RELY ON TO SUPPORT HIS CLASS CERTIFICATION CONCERNING
23 COMPARATIVE PRICING'S EFFECT ON CONSUMERS.

24 THE MAIN DISPUTE HERE APPEARS TO BE OVER REQUEST FOR
25 PRODUCTION 22, IN WHICH DEFENDANT SPECIFICALLY SEEKS

1 INFORMATION ON THE MARONICK SURVEY BY PLAINTIFF'S EXPERT,
2 DR. MARONICK.

3 AND AS THIS IS VERY LIKELY TO BE MISTRANSCRIBED,
4 I'LL SPELL THAT OUT FOR THE RECORD. DR. MARONICK IS SPELLED
5 M, AS IN MICHAEL, M-A-R-O-N-I-C-K.

6 AND THERE IS ARGUMENT HERE ABOUT WHETHER
7 DR. MARONICK'S SURVEY AND UNDERLYING INFORMATION IS
8 PRIVILEGED OR WHETHER THAT PRIVILEGE HAS BEEN WAIVED BECAUSE
9 IT WAS RELIED ON IN THE THIRD AMENDED COMPLAINT.

10 MY TENTATIVE THOUGHTS ON THESE LAST SET OF ISSUES
11 ARE AS FOLLOWS: I BELIEVE THAT -- PUTTING ASIDE THE MARONICK
12 SURVEY FOR THE MOMENT, THAT PLAINTIFF SHOULD BE REQUIRED TO
13 SUPPLEMENT HIS RESPONSES TO BE RESPONSIVE TO THE QUESTIONS
14 ASKED, EVEN IF THE RESPONSE IS AS HE CURRENTLY CLAIMS THAT
15 THERE IS NOTHING FURTHER TO PRODUCE; AND THAT PLAINTIFF MUST
16 APPROPRIATELY VERIFY THAT RESPONSE.

17 IT APPEARS THAT THE REQUEST FOR PRODUCTION, THESE
18 REQUESTS FOR PRODUCTION IN GENERAL ARE PERMISSIBLE UNDER THE
19 RULES.

20 TURNING FINALLY TO REQUEST FOR PRODUCTION 22
21 REGARDING THE MARONICK SURVEY, DEFENDANT ARGUES THAT THE WORK
22 PRODUCT PRIVILEGE HAS BEEN WAIVED, AS I MENTIONED EARLIER
23 BECAUSE OF PLAINTIFF'S DISCLOSURE OF AND RELIANCE ON THAT
24 SURVEY IN THE THIRD AMENDED COMPLAINT AND IN ANOTHER LAWSUIT
25 AGAINST LEVI STRAUSS.

1 PLAINTIFF ARGUES THAT IT IS, IN FACT, PRIVILEGED,
2 BUT I THINK DEFENDANT IS CORRECT THAT THE FACT THAT IT'S
3 PRIVILEGED IS PRESUPPOSED IN ANY WAIVER ARGUMENT.

4 AT THIS POINT, BASED ON WHAT'S BEFORE THE COURT, IT
5 APPEARS THAT ANY PRIVILEGE HAS BEEN WAIVED, AND THAT REQUEST
6 FOR PRODUCTION 22 WOULD NEED TO BE ANSWERED IN FULL. BUT I
7 CERTAINLY INVITE THE PARTIES TO ADDRESS THAT IN ORAL ARGUMENT
8 AS TO RFP 22.

9 AND AS TO ALL OF THESE POINTS, AS I MENTIONED, THESE
10 ARE MERELY MY TENTATIVE RULINGS. SO I WILL GIVE -- I WILL
11 NOW TURN THE FLOOR OVER TO THE PARTIES. AND SINCE THIS IS
12 NORDSTROM'S MOTION, I WILL GIVE THEM FIRST ARGUMENT.

13 MS. PEARCE: THANK YOU, YOUR HONOR.

14 WOULD YOU LIKE ME UP AT THE PODIUM?

15 THE COURT: WHEREVER YOU FEEL MOST COMFORTABLE.

16 MS. PEARCE.

17 MS. PEARCE: THANK YOU. GOOD AFTERNOON, YOUR HONOR.

18 AS TO THE PROCEDURAL ISSUES, WE DID, IN FACT, HAVE A
19 TELEPHONIC MEET AND CONFER. AFTER THE INITIAL LETTER WAS
20 SENT, THERE WAS A TELEPHONE CONVERSATION TO DISCUSS THE
21 DEFICIENCIES WHICH HAD BEEN OUTLINED IN THE LETTER.

22 THE COURT: WHEN WAS THAT?

23 MS. PEARCE: THAT OCCURRED -- AVI, DO YOU HAPPEN TO
24 HAVE THAT? OR -- I'M SORRY. MR. KAUFMAN, DO YOU HAPPEN TO
25 HAVE THAT?

1 MR. KAUFMAN: NO, I DON'T. I APOLOGIZE. I DON'T
2 HAVE THE EXACT DATE OF THAT.

3 I WILL VERIFY THERE WAS A TELEPHONIC MEET AND
4 CONFER, THE RESULTS OF WHICH ARE DISPUTED BETWEEN THE PARTIES
5 AND WHICH CAUSED SOME OF THE ADDITIONAL CONFUSION FROM OUR
6 PERSPECTIVE WITH REGARD TO THE SUPPLEMENTATION, AND
7 PARTICULARLY WITH -- YOU KNOW, RESULTING IN OUR DESIRE FOR
8 FURTHER MEET AND CONFERS AFTER THE SUPPLEMENTATION AFTER THEY
9 INDICATED TO US JUST BASICALLY, THIS ISN'T GOOD ENOUGH.
10 WE'RE FILING A MOTION TO COMPEL.

11 WE THOUGHT, WELL, PERHAPS WE SHOULD HAVE ANOTHER
12 CONVERSATION, SOME OF THESE THINGS BEING RESOLVABLE.

13 THE COURT: OKAY. THANK YOU.

14 MS. PEARCE: YOUR HONOR, IT TOOK PLACE ON
15 APRIL 17TH, 2017.

16 IN LIGHT OF YOUR RECENT CHAMBER RULES ABOUT THE
17 TIMING OF BRINGING THE MOTION TO COMPEL AND THE FACT THAT THE
18 DEFICIENCIES WHICH WOULD BE DISCUSSED IN A FURTHER
19 CONVERSATION HAD ALREADY BEEN OUTLINED IN THE LETTER AND HAD
20 BEEN DISCUSSED PRIOR TO THE SUPPLEMENTAL RESPONSES, WE DIDN'T
21 SEE THAT THERE WAS ANY MORE TO BE ACCOMPLISHED IN A FURTHER
22 DISCUSSION.

23 THE COURT: OKAY. DO YOU WANT TO ADDRESS THE
24 MERITS?

25 MS. PEARCE: SURE.

1 AS TO INTERROGATORIES NOS. 2 AND 3, DEFENDANT'S VIEW
2 IS THAT IN THIS INSTANCE, A PRODUCTION OF DOCUMENTS IS NOT
3 SUFFICIENT IN LIEU OF TESTIMONY OUTLINING THE PURCHASES
4 BECAUSE OF THE FACT THAT THERE SEEMS TO BE SOME DISCREPANCY
5 BETWEEN THE RECORDS WHICH HAVE BEEN PRODUCED AND A
6 TRANSACTION HISTORY WHICH THE LIMITED INFORMATION THAT
7 DEFENDANT HAS RECEIVED HAS ALLOWED IT TO PRODUCE BASED UPON
8 ITS KNOWLEDGE OF THE PLAINTIFF'S NAME.

9 AND, FURTHERMORE, THAT THERE IS A PRICE TAG FOR AN
10 ITEM IN THE THIRD AMENDED COMPLAINT FOR WHICH NO RECEIPT HAS
11 BEEN PRODUCED.

12 SO IN THIS INSTANCE, THOUGH PERHAPS IN SOME
13 SITUATIONS A PRODUCTION OF RECORDS WOULD BE ADEQUATE, WE
14 DON'T BELIEVE THAT IT IS IN THIS CASE AN ADEQUATE SUBSTITUTE
15 FOR HIS SWORN STATEMENTS OUTLINING HIS PURCHASES.

16 THE COURT: ARE YOU GOING TO BE DEPOSING HIM?

17 MS. PEARCE: YES.

18 THE COURT: AND WHEN IS THAT?

19 MS. PEARCE: A DATE HAS NOT BEEN SET. WE WERE
20 HOPING TO RESOLVE THIS ISSUE BEFORE CONDUCTING THE
21 DEPOSITION.

22 THE COURT: OKAY.

23 MS. PEARCE: I IMAGINE YOU DON'T WANT ME TO DISCUSS
24 4 AND 16 SINCE I AGREE WITH THE TENTATIVE, OR 11 AND 12,
25 THOUGH I'D BE HAPPY TO RESPOND TO ANY ARGUMENT FROM PLAINTIFF

1 ON THOSE.

2 THE COURT: OKAY.

3 MS. PEARCE: AS TO INTERROGATORIES 5 TO 7, THE
4 DEFENDANT'S VIEW IS THAT THESE ARE APPROPRIATE CONTENTION
5 INTERROGATORIES BECAUSE THEY ASK FOR THE INFORMATION -- THE
6 FACTS WHICH DEMONSTRATE THE ALLEGATIONS IN THE COMPLAINT, THE
7 CONCLUSORY ALLEGATIONS ABOUT DECEPTION AND RELIANCE AND HIS
8 HARM.

9 AND SO IN THAT WAY WE FEEL THAT HIS CONTENTION AS
10 TO, YOU KNOW, WHAT -- YOU KNOW, IF, IN FACT, IT'S TRUE THAT
11 HE HAS NOT RETAINED ANY EXPERTS YET ON THESE ISSUES, THEN
12 PRESUMABLY THERE WAS SOME FACTUAL BASIS UPON WHICH HE
13 BELIEVED THAT THESE PRICES WERE DECEPTIVE AND THAT HE HAD
14 BEEN HARMED. AND WE BELIEVE THAT THAT'S WHAT INTERROGATORIES
15 5 AND 7 ARE AIMED TO GET AT.

16 AND INTERROGATORIES 9 AND 10 GO TO THE LEGAL CLAIM
17 AS IT WAS MADE IN THE COMPLAINT, THE ALLEGATION THAT THESE
18 PRICES ARE DECEPTIVE TO CONSUMERS. THAT CONTENTION WAS MADE,
19 AND THIS SEEKS THE FACTS AND THE EVIDENCE UNDERLYING THAT
20 CONTENTION.

21 AND IT'S TRUE, YOU KNOW, IF -- IF, IN FACT,
22 DR. MARONICK'S WORK WAS A PART OF THAT BASIS FOR WHICH THAT
23 CONTENTION WAS MADE IN THE COMPLAINT, THEN WE BELIEVE THAT
24 THOSE FACTS AND EVIDENCE UNDERLYING THAT OPINION MUST BE
25 DISCLOSED.

1 AND IN ANY EVENT, THE RESPONSE AS IT IS NOW, WHICH
2 IS WHAT THE PLAINTIFF HIMSELF BELIEVED THE PRICES TO MEAN IS
3 NOT RESPONSIVE TO THE QUESTION THAT WAS POSED.

4 THE COURT: I AGREE THAT THE RESPONSE IS NOT
5 ADEQUATE, BUT IT DOES SEEM TO ME, AS I MENTIONED IN MY
6 TENTATIVE, THAT THIS IS REQUESTING EXPERT TESTIMONY ON
7 VALUATION AND REGIONAL CONSUMER BEHAVIOR.

8 AND YOU'RE GETTING SOME OF THIS SAME INFORMATION
9 FROM YOUR REQUEST FOR PRODUCTION --

10 MS. PEARCE: CORRECT.

11 THE COURT: -- AREN'T YOU?

12 MS. PEARCE: YES. THESE ARE IN SOME WAY
13 DUPLICATIVE. WE'RE REALLY -- THE CONTENTION HAS ALREADY BEEN
14 MADE IN THE COMPLAINT. SO WE'RE SEEKING THE FACTS -- I MEAN,
15 UNLESS HE HAS A CONTENTION NOW WHICH IS DIFFERENT FROM THAT
16 MADE IN THE COMPLAINT, WE'RE SEEKING THE FACTS AND THE
17 EVIDENCE WHICH UNDERLY THAT CONTENTION.

18 THE COURT: BUT TO THE EXTENT IF HE, HIMSELF, IS NOT
19 AN EXPERT, THEN HE WOULD HAVE TO BE RELYING ON DOCUMENTS, IT
20 SEEMS TO ME, TO COME TO THOSE CONCLUSIONS, AND THOSE WOULD BE
21 REQUIRED BY THE REQUEST FOR PRODUCTION; CORRECT?

22 MS. PEARCE: IF THAT'S THE WHOLE OF THE BASIS FOR
23 THAT CONTENTION, THEN ABSOLUTELY IT'S COVERED BY RFP 22. BUT
24 IF IT WEREN'T, WE WOULD WANT THAT TO BE DISCLOSED, IF HE HAD
25 AN INDEPENDENT FACTUAL OR EVIDENTIARY BASIS FOR THAT

1 CONTENTION.

2 THE COURT: AND DID YOU HAVE ANY ARGUMENT ON THE
3 REQUEST FOR PRODUCTION, OR DID YOU --

4 MS. PEARCE: WE AGREE WITH THE TENTATIVE ON THE
5 REQUEST FOR PRODUCTION.

6 THE COURT: ALL RIGHT. THANK YOU, MS. PEARCE.
7 OKAY. MR. KAUFMAN.

8 MR. KAUFMAN: THANK YOU, JUDGE SCHOPLER.

9 IF I CAN BEGIN WITH THE WAIVER ISSUE. I THINK THERE
10 IS TWO ISSUES TO BE ADDRESSED. THE FIRST IS WHETHER OR NOT
11 THERE IS GOOD CAUSE, AND THE SECOND IS WHAT IS THE EFFECT.
12 AND WE SUBMIT THERE WASN'T. WE BELIEVE THAT THERE WAS GOOD
13 CAUSE, GIVEN THE BACK-AND-FORTH BETWEEN THE PARTIES RELATING
14 TO THE DEFICIENCIES THAT WE PERCEIVED IN DEFENDANT'S
15 RESPONSES.

16 WE RECEIVED THE REQUEST FOR PRODUCTION AND THE
17 INTERROGATORIES DURING WHAT ENDED UP BEING A FOUR-AND-A-HALF
18 MONTH MEET AND CONFER, AND, YOU KNOW, IT WAS LOST IN THE
19 SHUFFLE ON OUR END BECAUSE WE SORT OF LOOPED IT WITH THAT
20 ONGOING MEET AND CONFER. SO IT WAS A MISTAKE, BUT IT WAS A
21 WELL-MEANING MISTAKE, YOUR HONOR.

22 SO WE BELIEVE ON THAT BASIS, THERE IS SUFFICIENT
23 EVIDENCE TO FIND GOOD CAUSE. SO EVEN IF THE COURT FINDS --

24 THE COURT: WELL, WALK ME THROUGH THAT. HOW DOES --
25 I'M NOT SURE HOW ONE HAS ANYTHING TO DO WITH THE OTHER. WHY

1 WOULD YOU NOT --

2 MR. KAUFMAN: YOUR HONOR -- YOUR HONOR, IN OUR
3 CONVERSATIONS, WE WERE JUST TALKING ABOUT DISCOVERY
4 GENERALLY, AND WE CONTINUOUSLY WORKED EXCHANGING -- WITH
5 DOCUMENTS ON BOTH SIDES OF THINGS, YOU KNOW, OTHER REQUESTS
6 OUTWARD AND REQUESTS INWARD.

7 IT WAS A MISTAKE, YOUR HONOR. THERE IS NOT A GREAT
8 EXPLANATION, BUT THAT'S THE EXPLANATION THAT THERE IS.

9 THE COURT: ALL RIGHT. WHAT ABOUT WITH REGARD TO
10 THE VERIFICATION, WHY WOULDN'T THAT SIMPLY HAVE FOLLOWED THE
11 REQUIREMENTS OF RULE 33(B) REGARDLESS OF WHAT CONVERSATIONS
12 YOU WERE HAVING WITH OPPOSING COUNSEL?

13 MR. KAUFMAN: YOUR HONOR, ADMITTEDLY, IT ABSOLUTELY
14 SHOULD HAVE.

15 I THINK THE CONFUSION OCCURRED BECAUSE MR. BRANCA IS
16 THE FINANCE DIRECTOR OF THE CITY OF CARLSBAD. THERE IS A
17 NOTARY IN HIS OFFICE, AND IT IS HER PREFERENCE --
18 NOTWITHSTANDING WHAT WE SENT TO MR. BRANCA WAS AN APPROPRIATE
19 VERIFICATION, IT WAS HER PREFERENCE TO COMPLETE THIS FORM.

20 UNTIL I HAD A FULL GRASP OF THE REPLY, I DIDN'T EVEN
21 UNDERSTAND. WE'RE IN THE PROCESS OF RESOLVING IT, AND WE
22 FULLY INTEND TO PROVIDE AN APPROPRIATE VERIFICATION. AND
23 THERE WAS NO INTENT TO PLAY GAMES WITH THE VERIFICATION.
24 AGAIN, YOU KNOW, PERHAPS A LITTLE BIT SLOPPY, BUT NOTHING
25 MORE THAN THAT, YOUR HONOR.

1 THE COURT: OKAY.

2 MR. KAUFMAN: BUT GOING ON TO THE ISSUE OF EVEN IF
3 THE COURT WERE TO FIND WAIVER, WHAT THE EFFECT IS. THE
4 TOWNSEND (PHONETIC) CASE THAT IS CITED BY -- WELL, PUTTING
5 ASIDE THE TOWNSEND CASE, THE COURT HAS ALREADY FOUND THAT IF
6 THERE IS A FAILURE TO DISCHARGE THE MEET-AND-CONFER
7 OBLIGATIONS, THERE IS A SUFFICIENT BASIS FOR IGNORING --
8 (INAUDIBLE).

9 BUT EVEN IF THE COURT WERE TO FIND THERE ISN'T, THE
10 WAIVER WILL BE ONLY AS TO OBJECTIONS. THAT'S THE CASE LAW
11 CITED BY NORDSTROM. THAT'S THE SHEA VS. BEST BUY CASE. AND
12 IT SPECIFICALLY DELINEATES BETWEEN OBJECTIONS AND VALID
13 PRIVILEGES, AND DOESN'T FIND WAIVER OF VALID PRIVILEGES AS A
14 MATTER OF, YOU KNOW, IMMEDIATE HAPPENSTANCE BY THE FAILURE TO
15 TIMELY RESPOND.

16 NOW, EVEN IF THE COURT WERE TO FIND THAT THERE
17 WAS A WAIVER OF OBJECTIONS, THIS WOULD ONLY IMPLICATE
18 INTERROGATORIES 11 AND 12. AND WE DON'T THINK IT WOULD
19 MATTER MUCH, ONE, GIVEN THE COURT'S TENTATIVE RULINGS; BUT,
20 TWO, IT'S THE DEFENDANT'S INITIAL BURDEN AND THE PARTY
21 SEEKING TO COMPEL PRODUCTION INITIAL BURDEN TO ESTABLISH THE
22 RELEVANCY OF THEIR REQUEST. AND HERE, WE CONTINUE TO CONTEND
23 THAT INTERROGATORIES 11 AND 12 ARE NOT RELEVANT.

24 AND ON THIS ISSUE, I JUST WANT TO PREVIEW AN
25 UPCOMING MOTION TO QUASH FOR THE COURT. THE DEFENDANT HAS

1 SERVED A SUBPOENA ON CITIBANK RELATING TO THE PLAINTIFF'S
2 TRANSACTION HISTORY FOR SEVEN YEARS FOR ALL ACCOUNTS. NOW,
3 WE'LL BE FILING A MOTION TO QUASH, SEEKING TO CONTROL THE WAY
4 IN WHICH THIS PROCESS IS UNDERTAKEN.

5 BUT I WAS HOPING TO GET FROM YOUR HONOR AT THE END
6 OF THIS HEARING A TENTATIVE HEARING DATE THAT WE CAN INCLUDE
7 WITH OUR MOTION, WHICH WE ARE DUE TO FILE THIS AFTERNOON.
8 BUT I JUST WANTED TO PREVIEW THAT FOR THE COURT AND THEN MOVE
9 ON TO THE REMAINING ISSUES, UNLESS THE COURT HAS ANY MORE
10 QUESTIONS ABOUT THE WAIVER ISSUE.

11 THE COURT: NO. WE CAN PROCEED TO THE MERITS.

12 MR. KAUFMAN: THANK YOU, YOUR HONOR.

13 SO MOVING ON TO THE MERITS AS TO INTERROGATORIES 2
14 AND 3. THE FIRST THING I WANTED TO ADDRESS IS THE TWO
15 ALLEGED DISCREPANCIES WITH THE TRANSACTION HISTORY. THE
16 FIRST DISCREPANCY IS APPARENTLY ADDITIONAL PURCHASES TO THE
17 NAME KEVIN BRANCA. WE'VE INVESTIGATED THIS. WE ARE IN THE
18 PROCESS OF INVESTIGATING THIS.

19 IT IS OUR CURRENT UNDERSTANDING FROM THE PLAINTIFF
20 THAT HIS HUSBAND HAS MADE PURCHASES PERHAPS IN HIS NAME FROM
21 NORDSTROM. THEY ARE GOING TO A STORAGE FACILITY THAT THEY
22 MAINTAIN OLD TAX RECORDS AT AND WILL BE LOOKING THROUGH
23 RECEIPTS THERE TO SEE IF THEY ARE ABLE TO IDENTIFY IN
24 CONNECTION WITH MR. BRANCA'S HUSBAND'S DOCUMENTS ANY RECEIPTS
25 REFLECTING HIS PURCHASES THAT MAY HAVE BEEN MADE IN THE NAME

1 OF KEVIN BRANCA EITHER ONLINE OR OTHERWISE.

2 JUST -- SO THAT'S THE FIRST ALLEGED DISCREPANCY.
3 AND THE SECOND IS THE THIRD AMENDED -- THE PRICE TAG IN THE
4 THIRD AMENDED COMPLAINT. THE PRICE TAG IN THE THIRD AMENDED
5 COMPLAINT WAS AN EXEMPLAR. WE DON'T ALLEGE IN THE THIRD
6 AMENDED COMPLAINT THAT THE PRICE TAG IS ASSOCIATED WITH A
7 PRODUCT PURCHASED BY MR. BRANCA.

8 WE DIDN'T INTEND TO ALLEGE THAT. WE WERE JUST
9 TRYING TO DEMONSTRATE TO THE COURT VISUALLY WHAT THE ACCEPTED
10 COMPARE AT PRICE TAGS LOOKED LIKE. THAT'S THE REASON THAT
11 THAT HAPPENED TO BE INCLUDED IN THE TRANSACTION HISTORY.

12 NOW, AS TO THE ISSUE OF THE FORM OF THE TRANSACTION
13 HISTORY AND NOT NECESSARILY THE SUBSTANCE, WE -- OUR FIRST
14 UNDERSTANDING CONTINUES TO BE THAT MR. BRANCA HAS MADE TWO
15 PURCHASES OR PURCHASED TWO DIFFERENT TIMES FROM NORDSTROM
16 RACK; AND WE PRODUCED THE COMPLETE RECEIPTS FOR THOSE TWO
17 PURCHASES.

18 BOTH OF THEM INCLUDE MULTIPLE PRODUCTS AND BOTH OF
19 THEM PROVIDE ALL OF THE INFORMATION THAT DEFENDANTS HAS
20 REQUESTED IN REGARDS TO EACH PURCHASE MADE BY MR. BRANCA FROM
21 NORDSTROM RACK. SO WE BELIEVE THAT THE SUBSTANCE IS ADEQUATE
22 TO CONVEY THE INFORMATION BEING SOUGHT.

23 WITH REGARDS TO INTERROGATORIES 4 AND 16, WE HAVE NO
24 PROBLEM AMENDING TO INDICATE THAT THERE HAVE BEEN NO RETURNS
25 AND NO OTHER ADVERTISEMENTS THAT WERE SEEN BY MR. BRANCA AND

1 PROVIDING A PROFFER OR VERIFICATION THAT COMPLIES WITH
2 RULE 33.

3 MS. PEARCE: YOUR HONOR, IF I MAY BE HEARD -- MAY I
4 RESPOND TO THE ISSUES THAT WE'VE DISCUSSED THUS FAR, OR SHALL
5 I WAIT UNTIL WE FINISH?

6 THE COURT: WELL, MR. KAUFMAN, IF YOU WANT TO HEAR
7 HER INTERJECTION, I'LL HEAR IT FROM HER; BUT, OTHERWISE, I
8 GENERALLY PREFER FOR ONE PARTY TO FINISH SPEAKING AND
9 THEN --

10 MS. PEARCE: CERTAINLY.

11 MR. KAUFMAN: YEAH. IF I CAN JUST CONTINUE, GIVEN
12 THAT I ALLOWED HER --

13 THE COURT: CERTAINLY.

14 MR. KAUFMAN: -- HER TO FINISH SPEAKING.

15 THE COURT: PLEASE CONTINUE.

16 MR. KAUFMAN: THANK YOU, YOUR HONOR.

17 SO GOING TO INTERROGATORIES 11 AND 12, IT'S OUR
18 THEORY, AND IT'S OUR POSITION BASED ON DISCOVERY TO DATE,
19 INCLUDING THE DEPOSITION OF THE NORDSTROM'S CORPORATE
20 REPRESENTATIVE, THAT NORDSTROM SELLS CERTAIN PRODUCTS THAT
21 ARE MANUFACTURED EXCLUSIVELY AND SPECIFICALLY FOR NORDSTROM
22 RACK WITH COMPARE AT PRICING.

23 IT'S OUR POSITION THAT THESE ARE DECEPTIVE AS A
24 MATTER OF FACT BECAUSE THE PRICES DO NOT REFLECT ACTUAL
25 ORIGINAL PRICES OR MSRP'S AT WHICH THE PRODUCTS WERE

1 PREVIOUSLY SOLD.

2 IN THAT REGARD, WHETHER OR NOT MR. BRANCA HAS
3 PURCHASED ANOTHER TOMMY HILFIGER SHIRT ELSEWHERE, EITHER ON
4 SALE OR OTHERWISE, ISN'T RELEVANT TO THE CONTENTION THAT BY
5 ADVERTISING A PRICE THAT WAS NEVER A PRICE ASSOCIATED WITH
6 THE PRODUCT, MR. BRANCA AND PUTATIVE CLASS MEMBERS PURCHASED
7 AT NORDSTROM HAS CAUSED A DECEPTION ON THEM.

8 THE COURT: WELL, IT WOULD BE RELEVANT TO THE CLAIM
9 THAT MR. BRANCA IS NOT, IN FACT, DECEIVED, THOUGH; RIGHT?

10 IF THE COMPARE AT PRICE SAYS HE CAN BUY A TOMMY
11 HILFIGER SHIRT FOR \$30, AND IT'S BEING OFFERED FOR \$35
12 SOMEWHERE ELSE, AND HE, IN FACT, THAT SAME DAY BOUGHT IT
13 SOMEWHERE ELSE FOR \$30, HE WOULDN'T HAVE BEEN DECEIVED BY
14 THAT AD; RIGHT?

15 MR. KAUFMAN: YOUR HONOR, THAT WOULD ONLY BE
16 RELEVANT TO THE EXTENT THAT MR. BRANCA PURCHASED THE
17 IDENTICAL PRODUCT THAT HE PURCHASED AT NORDSTROM RACK.

18 OUR POSITION IS THAT THE IDENTICAL PRODUCTS BEING
19 SOLD AT NORDSTROM RACK WITH "COMPARE AT" THAT WOULD FALL
20 WITHIN THIS DEFINITION WERE NOT SOLD ELSEWHERE, WERE NOT
21 BEING SOLD ELSEWHERE AT THAT PRICE AT THE TIME THAT HE MADE
22 HIS PURCHASES FROM NORDSTROM RACK.

23 SO UNLESS IT WAS THE IDENTICAL PRODUCT, NO, IT WOULD
24 NOT SATISFY THE INQUIRY.

25 THE COURT: WELL -- AND JUST TO MAKE SURE THAT WE'RE

1 TALKING THE SAME LANGUAGE HERE. LET ME GRANT FOR THE MOMENT
2 THAT IT WAS NOT BEING OFFERED AT THE PRICE, BUT THE QUESTION
3 ISN'T WHAT PRICE IT WAS BEING OFFERED AT.

4 THE QUESTION IS WHETHER HE, IN FACT, BOUGHT THE
5 IDENTICAL ITEM FROM THE STORE THAT WAS BEING COMPARED AT;
6 RIGHT? THAT WAS --

7 (OVERLAPPING DIALOGUE.)

8 THE COURT: THE QUESTION IS WHETHER HE PURCHASED THE
9 IDENTICAL ITEM FROM OTHER STORES AND WOULD HAVE BEEN AWARE OF
10 WHAT THEIR ACTUAL PRICING HISTORY IS. ISN'T THAT -- ISN'T
11 THAT --

12 MR. KAUFMAN: I WOULD AGREE THAT IF THE INQUIRY
13 WERE, IDENTIFY ALL PRODUCTS IDENTICAL TO THE PRODUCTS YOU
14 PURCHASED FROM NORDSTROM RACK THAT YOU PURCHASED ELSEWHERE
15 AND PROVIDE DETAILED, YOU KNOW, TO THE EXTENT AVAILABLE ON
16 THOSE, I DO AGREE THAT THAT WOULD BE RELEVANT AND WE WOULD
17 HAVE RESPONDED TO THAT. BUT THAT'S NOT WHAT IS BEING ASKED
18 FOR HERE, YOUR HONOR.

19 THEY ARE ASKING FOR MUCH MORE. IN FACT, WHAT THEY
20 ARE ASKING THE PLAINTIFFS TO DO, AND REALLY THE ONLY LOGICAL
21 WAY TO ACCOMPLISH IT IS TO OPEN HIS CLOSET AND HIS DRAWERS
22 AND GO ONE BY ONE THROUGH HIS ITEMS AND SAY, THIS IS A PAIR
23 OF TOMMY HILFINGER SHORTS, I SUPPOSE PHOTOGRAPH THEM OR MAKE
24 THEM AVAILABLE FOR INSPECTION, AND TRY TO REMEMBER WHERE HE
25 PURCHASED THEM, WHEN HE PURCHASED THEM, HOW MUCH HE PAID,

1 WHAT REPRESENTATIONS, YOU KNOW, PRICE OR DISCOUNT MIGHT HAVE
2 BEEN MADE TO HIM AT THE TIME HE MADE THE PURCHASE AND
3 OTHERWISE.

4 AND THAT'S JUST UNLIKELY TO YIELD ANYTHING USEFUL
5 FOR ANY PARTY.

6 THE COURT: CAN HE REQUEST THAT INFORMATION FROM THE
7 COMPETITOR STORES ON HIS PURCHASE HISTORY, IF HE'S USING A
8 PARTICULAR ACCOUNT, FOR EXAMPLE, OR EVEN A PARTICULAR CREDIT
9 CARD?

10 IT MIGHT BE A WAY OF --

11 MR. KAUFMAN: BASED ON NORDSTROM'S SEEMING INABILITY
12 TO BACK END THEIR WAY INTO FIGURING OUT WHAT TRANSACTIONS HE
13 PURCHASED, I WOULD DOUBT THAT THE COMPETITORS WOULD HAVE
14 SOMETHING THAT NORDSTROM DIDN'T.

15 BUT I DON'T -- BUT I DO NOT KNOW THAT WITH ANY
16 DEGREE OF CERTAINTY, YOUR HONOR. I WOULD BE MERELY
17 SPECULATING BY SAYING THAT. BUT BASED ON THE EXPERIENCE
18 DEALING WITH NORDSTROM, I WOULD SAY IT'S UNLIKELY.

19 THE COURT: OKAY. THANK YOU.

20 MR. KAUFMAN: SO MOVING ON TO INTERROGATORIES 5
21 THROUGH 7 AND 9 AND 10. WE AGREE FULLY WITH THE COURT THAT
22 THESE ARE REQUESTING EXPERT TESTIMONY.

23 THE PLAINTIFF ULTIMATELY KNOWS WHAT HE KNOWS AND
24 ISN'T IN A POSITION TO TESTIFY OR TO VERIFY UNDER OATH WHAT
25 HIS EXPERT WILL ULTIMATELY OPINE. WHILE THE PLAINTIFF IS

1 AWARE THAT THERE WILL BE -- THE PLAINTIFF IS FULLY AWARE THAT
2 THERE WILL BE EXPERTS ENGAGED TO ADDRESS THESE ISSUES.

3 ADDITIONALLY, WE THINK THAT THE RESPONSES TO THE
4 INTERROGATORIES ARE OTHERWISE SUFFICIENT BECAUSE THEY ARE
5 CONSISTENT WITH THE ALLEGATIONS ALLEGED IN THE THIRD AMENDED
6 COMPLAINT, WHICH THE COURT FOUND SUFFICIENT TO SATISFY RULE
7 (B)9 -- RULE 9(B)-TYPE PLEADING STANDARD.

8 SO AS A MATTER OF FIRST INSTANCE, THE COURT HAS
9 ALREADY FOUND THAT THESE ARE SUFFICIENT TO SET FORTH THE
10 TYPES OF CLAIMS WHICH DIRECT THE LEVEL OF SPECIFICITY TO
11 ADVISE NORDSTROM OF WHAT THEY ARE TO DEFEND AGAINST AND WHAT
12 THE ALLEGATIONS ARE. AND THAT'S PRECISELY THE SITUATION
13 HERE.

14 BUT EVEN IF THEY WEREN'T, IT WOULD STILL BE AN
15 INAPPROPRIATE BASIS FOR OBTAINING EXPERT TESTIMONY. AND I
16 SUPPOSE WE CAN ADDRESS THAT NOW WITH REGARDS TO THE MARONICK
17 ITEM, REQUEST FOR PRODUCTION 22.

18 OBVIOUSLY WE HAVE NO PROBLEM SUPPLEMENTING OUR
19 RESPONSE TO REQUESTS 10, 11, 13, 14, 19, 20, 21 AND 23 TO
20 INDICATE THAT NOTHING HAS BEEN WITHHELD FROM THOSE REQUESTS.

21 YOUR HONOR MENTIONED APPROPRIATELY VERIFYING THE
22 RESPONSE TO THE REQUEST FOR PRODUCTION, AND I JUST WANT TO
23 UNDERSTAND CONCEPTUALLY WHETHER WE'RE BEING ASKED TO PROVIDE
24 VERIFICATION IN A SIMILAR FORMAT AS INTERROGATORIES TO THOSE
25 REQUESTS FOR PRODUCTION OR SOMETHING DIFFERENT, AND WHETHER

1 THE REPRESENTATION OF COUNSEL WILL BE SUFFICIENT, AS THEY
2 TYPICALLY ARE?

3 THE COURT: AS TO THE REQUEST FOR PRODUCTION?

4 MR. KAUFMAN: YEAH. YOUR HONOR MAY HAVE
5 INADVERTENTLY MENTIONED "APPROPRIATELY VERIFIED RESPONSE"
6 WHEN ASKED THAT PLAINTIFF SUPPLEMENT TO INDICATE THAT THERE
7 IS NOTHING FURTHER TO PRODUCE TO THE VARIOUS REQUESTS OTHER
8 THAN REQUESTS 1 AND 2.

9 THE COURT: NO -- YEAH, I MEAN I THINK -- I MAY HAVE
10 SAID APPROPRIATELY VERIFY, BUT IT WOULD BE THE STANDARD FOR
11 REQUEST FOR PRODUCTION ON THAT.

12 MR. KAUFMAN: OKAY. UNDERSTOOD, YOUR HONOR. SO
13 THANK YOU FOR THE CLARIFICATION.

14 MOVING ON TO REQUEST FOR PRODUCTION NO. 22. SO
15 THERE IS A DISCONNECT BETWEEN NORDSTROM -- WHAT NORDSTROM
16 ACTUALLY SEEKS AND WHAT NORDSTROM IS ENTITLED TO.

17 EVEN IF THE COURT WERE TO FIND THAT THERE IS A
18 WAIVER BY PUTTING THE MARONICK SURVEY AT ISSUE IN THE THIRD
19 AMENDED COMPLAINT AND LATER PRODUCING THE MARONICK SURVEY,
20 WHAT I DON'T THINK CAN BE DISPUTED IS THAT THEY ARE -- THAT
21 NORDSTROM IS ENTITLED TO NO MORE THAN THEY WOULD BE ENTITLED
22 TO IF MR. MARONICK WERE A TESTIFYING EXPERT AT THIS STAGE.

23 THERE HAS BEEN NO WAIVER OF PRIVILEGE THAT WOULD BE
24 ASSOCIATED WITH A TESTIFYING EXPERT. THERE WOULD BE NO
25 OBLIGATION TO PRODUCE COMMUNICATIONS BETWEEN COUNSEL AND THE

1 EXPERT. THERE WOULD BE NO OBLIGATION TO PRODUCE DRAFTS OF
2 REPORTS OR DRAFTS OF SURVEYS UNDERLYING THE REPORTS THAT WERE
3 MADE EXCLUSIVELY FOR THE BASIS OF PRODUCING THE REPORT.

4 THESE ARE THE THINGS THAT CONTINUE TO BE PROTECTED,
5 EVEN IF THE COURT FINDS WAIVER WITH RESPECT TO THE MARONICK
6 ITEMS AND REQUIRES A MORE FULSOME PRODUCTION IN RESPONSE TO
7 NO. 22.

8 HOWEVER, WE BELIEVE THAT THIS CASE IS CONSISTENT
9 WITH THE PLYDER (PHONETIC) CASE THAT WE CITE IN THE PAPERS,
10 THE DISTRICT OF NEW JERSEY CASE, IN WHICH THE PLAINTIFF PUT
11 AN EXPERT'S OPINION AT ISSUE VERY EARLY ON IN THE CASE. AND
12 THE COURT DIDN'T HAVE THE NEED TO ADOPT IT. ULTIMATELY,
13 BEFORE THE COURT EVER RULED ON THE SUFFICIENCY OR OTHERWISE
14 RELIED ON IT IN A MATERIAL WAY, THE PLAINTIFF WITHDREW THE
15 EXPERT AND THE DEFENDANT SOUGHT TO COMPEL PRODUCTION.

16 THE COURT FOUND THAT BECAUSE THERE WAS NO RELIANCE
17 ON THAT BIT OF EXPERT OPINION THAT WAS ALLEGEDLY PUT AT
18 ISSUE, THERE WAS NO BASIS FOR COMPELLING FURTHER PRODUCTION.
19 WE THINK THAT'S PRECISELY THE ISSUE HERE.

20 WITH RESPECT TO WHAT THE REASONABLE CONSUMERS
21 BELIEVED, THE COURT FOUND THAT IT WAS SUFFICIENT FOR
22 MR. BRANCA TO ALLEGE HIS PERSONAL EXPERIENCES AND TO PROVIDE
23 HIS OWN ANECDOTAL EVIDENCE TO SUPPORT THE NOTION THAT OTHER
24 REASONABLE CONSUMERS LIKE MR. BRANCA WERE SIMILARLY DECEIVED.
25 AND THAT'S PRECISELY THE CIRCUMSTANCE HERE.

1 EVEN THE WORLEY (PHONETIC) CASE THAT NORDSTROM
2 CITES, WHICH IS THE NORTHERN DISTRICT OF CALIFORNIA CASE,
3 SUPPORTS THE CONCLUSION THAT THE PROTECTIONS OF RULE 26(B)(4)
4 CONTINUE TO APPLY EVEN IF THERE IS A WAIVER WITH RESPECT TO A
5 CONSULTING EXPERT.

6 WITH THAT, I DON'T BELIEVE I HAVE ANYTHING FURTHER
7 TO ADDRESS WITH RESPECT TO THE -- UNLESS THERE IS ITEMS
8 RAISED BY MS. PEARCE'S FURTHER ARGUMENT TO THE COURT OR THE
9 COURT HAS ANY FURTHER QUESTIONS.

10 THE COURT: THANK YOU, MR. KAUFMAN.

11 MR. KAUFMAN: THANK YOU.

12 THE COURT: MS. PEARCE.

13 MS. PEARCE: THANK YOU, YOUR HONOR.

14 THE COURT: I'M AFRAID YOU'RE TAKING GOOD NOTES.

15 MS. PEARCE: AS TO OUR FIRST ISSUE ABOUT THE
16 TIMELINESS OF THE RESPONSES. DEFENDANT'S POSITION WOULD BE
17 THAT THERE WAS NOT GOOD CAUSE BECAUSE THE MEET AND CONFER
18 THAT WAS ONGOING AT THAT TIME, AT THE TIME THAT THESE
19 RESPONSES WERE DUE WAS ABOUT DEFENDANT'S OWN DATA
20 CAPABILITIES, AND WE FEEL THE PLAINTIFF HAS NOT EXPLAINED HOW
21 THOSE DISCUSSIONS AFFECTED HIS ABILITY TO RESPOND TO THE
22 QUESTIONS WHICH WERE PROPOSED BY DEFENDANT'S DISCOVERY
23 REQUESTS.

24 AS TO INTERROGATORIES 2 TO 3, WE DO TAKE ISSUE WITH
25 THE ASSERTION THAT THE PRICE TAG IN THE COMPLAINT WAS JUST AN

1 EXEMPLAR, BECAUSE THE TRANSACTIONAL HISTORY THAT WE HAVE BEEN
2 ABLE TO ASSEMBLE TO THIS POINT DOES INDICATE THAT THAT PRICE
3 TAG ALIGNS WITH A PURCHASE WHICH WAS MADE BY MR. BRANCA.

4 AND OBVIOUSLY THIS WILL ALL BE SUBJECT TO FURTHER
5 TEASING OUT, BUT WE BELIEVE THAT THERE IS -- THERE IS GOOD
6 REASON TO BELIEVE THAT THERE WERE -- THAT THE RECORDS WHICH
7 HAVE BEEN PRODUCED TO DATE ARE NOT A FULL AND COMPLETE RECORD
8 OF THE PURCHASES WHICH IS REQUESTED BY THESE INTERROGATORIES.

9 AS TO INTERROGATORIES 11 AND 12 ABOUT PRODUCTS OF
10 THE SAME BRANDS PURCHASED FROM OTHER RETAILERS. I KNOW THAT
11 MR. KAUFMAN'S VIEW IS THAT THIS CASE CONCERNS PRODUCTS WHICH
12 WERE NOT SOLD ELSEWHERE, BUT THAT FACT HAS NOT BEEN
13 ESTABLISHED AS TO THE PRODUCTS WHICH ARE IN THE COMPLAINT.

14 AND, YOU KNOW, ASIDE FROM WHETHER IT'S THE -- HIS
15 VIEW IS THAT ONLY A PURCHASE OF THE IDENTICAL PRODUCT
16 ELSEWHERE WOULD BE RELEVANT, OUR VIEW IS WE BELIEVE THAT
17 RELEVANCE IS FOR ONE THING A FAIRLY LOW BAR, BUT ALSO THAT IF
18 WE SAY THAT -- YOU KNOW, CONSIDER HYPOTHETICALLY WHERE ONE OF
19 THE PURCHASES AT ISSUE IS A PAIR OF TOMMY HILFIGER PANTS.

20 IF IT TURNED OUT THAT PLAINTIFF IS AN AVID SHOPPER,
21 A TOMMY HILFIGER CONNOISSEUR, WHO OWNS 15 PAIRS OF HILFIGER
22 PANTS, MAYBE SOME ARE IDENTICAL OR VIRTUALLY IDENTICAL TO THE
23 ONES HE PURCHASED AT RACK, HIS BUYING BEHAVIOR, WHATEVER THAT
24 TURNS OUT TO BE, COULD BE RELEVANT TO A NUMBER OF -- COULD
25 WEIGH IN A NUMBER OF WAYS ABOUT HIS RELIANCE AND ALSO WHETHER

1 THE PRICES WERE DECEPTIVE, WHETHER HE WAS, IN FACT, DECEIVED.

2 FOR EXAMPLE, IF IT SHOWED THAT THE PRICES HE PAID
3 REGULARLY WERE THE SAME OR VERY CLOSE TO THE COMPARE AT
4 PRICE, THAT WOULD CERTAINLY TEND TO SUGGEST THAT THE COMPARE
5 AT PRICE WAS NOT DECEPTIVE.

6 IF HE HAD NEVER PAID ANYTHING CLOSE TO THE COMPARE
7 AT PRICE FOR A PAIR OF TOMMY HILFIGER PANTS, THAT WOULD ALSO
8 TEND TO SHOW THAT HE WAS AN INFORMED CONSUMER WHO WOULD BE
9 UNLIKELY TO BE DECEIVED BY A COMPARE AT PRICE WHICH DID NOT
10 ALIGN WITH HIS PAST EXPERIENCE.

11 OR IF IT JUST HAPPENED TO BE A LOW PRICE COMPARED TO
12 WHAT HE USUALLY PAID, IT WOULD SUGGEST THAT HE BOUGHT THEM
13 BECAUSE THEY WERE A GOOD DEAL AND HE KNEW INDEPENDENTLY THAT
14 THEY WERE A GOOD DEAL, AND HE DIDN'T RELY ON THE COMPARE AT
15 PRICE.

16 SO WE THINK THAT HIS EXPERIENCE AS A CONSUMER WITH
17 THESE BRANDS AND WHAT THESE BRANDS SELL FOR GENERALLY, WHAT
18 SIMILAR PRODUCTS SELL FOR GENERALLY, WOULD INFORM HIS STATE
19 OF MIND AND THE ISSUES OF RELIANCE AND DECEPTION.

20 YOU KNOW, WE BELIEVE, AS I BELIEVE HAS BEEN
21 MENTIONED HERE, YOU KNOW, THIS IS NOT PURE SPECULATION
22 BECAUSE WE KNOW THAT THIS PLAINTIFF HAS BROUGHT ANOTHER
23 CONSUMER CLASS ACTION FOR A SIMILAR -- YOU KNOW, WITH SIMILAR
24 ALLEGATIONS AGAINST ANOTHER STORE. SO THE FACT THAT HE'S AN
25 AVID OR A SAVVY SHOPPER IS NOT OUTSIDE THE REALM OF

1 POSSIBILITY FOR SURE.

2 AS TO INTERROGATORIES 5 TO 7, I BELIEVE THAT WE
3 HAVE -- WE HAVE MOSTLY DISCUSSED THEM, BUT I -- I DO THINK
4 THAT THE RESPONSES THAT WERE GIVEN ARE LEGAL CONCLUSIONS
5 ABOUT PRICES BEING DECEPTIVE AND ABOUT WHAT PLAINTIFF WOULD
6 HAVE DONE OTHERWISE.

7 BUT RULE 11 REQUIRES THERE TO BE SOME KIND OF
8 FACTUAL OR EVIDENTIARY BASIS FOR THESE CONCLUSIONS. AND WE
9 BELIEVE THAT THAT'S WHAT INTERROGATORIES 5 TO 7 ARE SEEKING
10 TO GET AT, IS SOME KIND OF TANGIBLE, CONCRETE EXPLANATION FOR
11 WHY HE BELIEVES THAT THESE PRICES THAT HE PAID WERE DECEPTIVE
12 OR INCORRECT.

13 AND WHETHER THOSE ALLEGATIONS WERE SUFFICIENT TO
14 MEET THE STANDARDS OF 9(B), WE THINK THAT THE PLEADING
15 STANDARD IS VERY DIFFERENT FROM THE STANDARD IN RESPONDING TO
16 INTERROGATORIES.

17 I BELIEVE WE'VE ALREADY DISCUSSED OUR ARGUMENTS
18 ABOUT INTERROGATORIES 9 AND 10, ABOUT IF THERE ARE FACTS AND
19 EVIDENCE UNDERLYING MARONICK'S OPINION, WHICH IS THE SOURCE
20 OF THAT CONTENTION IN THE COMPLAINT, THAT IT SHOULD BE
21 DISCLOSED.

22 YOU KNOW, AS TO RFP NO. 22, YOU KNOW, IT'S CLEAR
23 THAT THE COURT DID RELY ON THE FIVE PAGES OF THESE SURVEY --
24 THE SURVEY SUMMARY AND RESULTS WHICH WERE INCLUDED IN THE
25 COMPLAINT.

1 THE ORIGINAL COMPLAINT, AS WE NOTED IN FOOTNOTE 3 OF
2 OUR REPLY, PLAINTIFF RELIED UPON THE SURVEY TO SURVIVE A
3 MOTION TO DISMISS OF THE AMENDED COMPLAINT, BECAUSE THE
4 ORIGINAL COMPLAINT WAS DISMISSED ON THE BASIS THAT HIS
5 ALLEGATIONS HAD NOT ESTABLISHED THAT THE PRICE TAGS WERE
6 LIKELY TO DECEIVE REASONABLE CONSUMERS, AND SURVIVED THE
7 LATER MOTION TO DISMISS WITH THE COURT RELYING IN PART UPON
8 SURVEY RESULTS WHICH PURPORTED TO DEMONSTRATE THAT 90 PERCENT
9 OF 206 PARTICIPANTS REPORTED INTERPRETING NORDSTROM RACK TAGS
10 IN A CERTAIN WAY.

11 WE BELIEVE THAT THIS HAS DEFINITELY BEEN PLACED --
12 AS THESE CASES THAT WE HAVE CITED HERE, WORLEY, THAT IT HAS
13 BEEN, QUOTE -- YOU KNOW, THESE OPINIONS HAVE BEEN BROUGHT
14 INTO THE JUDICIAL ARENA TO THE EXTENT THAT WE OUGHT TO BE
15 ABLE TO SEE THE UNDERLYING DATA, THE PATTERNS OF -- YOU KNOW,
16 IF SOMEONE RESPONDED TO ONE QUESTION ONE WAY, HOW DID THAT
17 INDIVIDUAL RESPONDENT RESPOND TO THE NEXT? WHO WERE THESE
18 PEOPLE AND HOW WERE THEY FOUND?

19 AND WE BELIEVE THAT IT'S UNFAIR TO TRY TO SORT OF
20 SELECTIVELY WAIVE THE PRIVILEGE FOR ADVANTAGEOUS INFORMATION
21 AND NOT DISCLOSE THE UNDERLYING INFORMATION.

22 WE BELIEVE IT'S RELEVANT INDEPENDENTLY AS TO THE
23 ISSUE OF WHETHER REASONABLE CONSUMERS ARE DECEIVED BY
24 NORDSTROM RACK'S PRICES. IF THIS PRIVILEGE HAS BEEN WAIVED,
25 THIS CLOSER INSPECTION OF THE ACTUAL METHODOLOGY COULD VERY

1 WELL UNDERMINE THE CONCLUSIONS WHICH WERE REACHED AND WHICH
2 WERE RELIED UPON IN THE COMPLAINT, AS WELL AS POTENTIALLY
3 PROVIDING EVIDENCE SUPPORTING THE OPPOSITE CONCLUSION.

4 AND WE KNOW THAT PLAINTIFF'S COUNSEL KNOWS WHAT
5 WE'RE SEEKING HERE BECAUSE IN OTHER CASES IN WHICH THE SAME
6 COUNSEL HAS BEEN INVOLVED ON BOTH SIDES, THEY HAVE SOUGHT THE
7 SAME INFORMATION FROM DEFENSE'S EXPERTS AND HAVE RECEIVED IT
8 AND HAVE USED IT TO ARGUE THAT IT SUPPORTED THEIR POSITION.

9 NOW, OBVIOUSLY NOT ALL, YOU KNOW, COMMUNICATIONS ARE
10 DISCOVERABLE, BUT EVEN AS TO TESTIFYING EXPERTS,
11 COMMUNICATIONS WHICH REVEAL THE UNDERLYING ASSUMPTIONS WHICH
12 WERE COMMUNICATED TO THE EXPERT OR THE FACTS THAT HAVE BEEN
13 COMMUNICATED TO THE EXPERT, THOSE ARE EXCEPTIONS FROM THAT
14 PRIVILEGE WHICH WE THINK WOULD APPLY IN THIS SITUATION AS
15 WELL.

16 THE COURT: THANK YOU, MS. PEARCE.

17 MS. PEARCE: THANK YOU, YOUR HONOR.

18 THE COURT: ANYTHING FURTHER FROM YOU,
19 MR. KAUFMAN?

20 MR. KAUFMAN: I THINK I'VE SET FORTH OUR POSITION
21 PRETTY -- PRETTY COMPREHENSIBLY, UNLESS THE COURT HAS ANY
22 QUESTIONS BASED ON THE ADDITIONS BY MS. PEARCE.

23 BUT I WILL NOTE THAT WITH RESPECT TO THE ISSUE OF
24 RELIANCE ON THE MARONICK SURVEY, THE COURT INDEPENDENTLY
25 FOUND THAT ANECDOTAL EVIDENCE IS SUFFICIENT TO ESTABLISH THAT

1 OTHER REASONABLE CONSUMERS MAY HAVE BEEN DECEIVED, AND THAT
2 WAS ALSO INCLUDED IN THE COMPLAINT.

3 THERE WERE MULTIPLE INDEPENDENT BASES FOR THE COURT
4 CONCLUDING THAT MR. BRANCA SUFFICIENTLY PLED DECEPTION IN THE
5 SECOND AMENDED AND THE THIRD AMENDED COMPLAINT, AND IT WAS
6 NOT LIMITED TO AND NOT NECESSARY THAT THE -- THAT THE SURVEY
7 RESULTS HAD BEEN INCLUDED, BUT NOTWITHSTANDING NORDSTROM'S
8 OWN INTERNAL RECORDS AND OWN INTERNAL PROCEDURES HAVE
9 ESTABLISHED THAT THEY INTENDED FOR CONSUMERS TO UNDERSTAND
10 PRECISELY WHAT THE SURVEY RESULTS WERE.

11 SO TO THE EXTENT THEY WANT TO TAKE ISSUE WITH THOSE
12 RESULTS, ALL THEY ARE TAKING ISSUE WITH IS PRECISELY WHAT
13 THEY WANTED PEOPLE TO UNDERSTAND.

14 THE COURT: THANK YOU, MR. KAUFMAN.

15 MS. PEARCE: I HAVE ONE FURTHER ISSUE, YOUR HONOR; I
16 APOLOGIZE. AND THAT IS THE MATTER OF FEES, WHICH IS THAT
17 DEFENDANT WOULD SEEK FEES IN ASSOCIATION WITH THIS MOTION,
18 PARTICULARLY BECAUSE SOME OF THESE ISSUES ABOUT VERIFICATION
19 AND, YOU KNOW, GETTING RESPONSES WHICH HAVE EVIDENTIARY
20 VALUE, WE THINK SHOULD NOT HAVE REQUIRED A MOTION TO
21 RESOLVE.

22 THE COURT: WELL, I'M GOING TO --

23 (OVERLAPPING DIALOGUE.)

24 THE COURT: GO AHEAD, MR. KAUFMAN. I DIDN'T MEAN TO
25 CUT YOU OFF.

1 MR. KAUFMAN: I WAS JUST GOING TO SAY, WE OBVIOUSLY
2 DISAGREE WITH THAT NOTION. WE BELIEVE THERE WAS A GOOD-FAITH
3 BASIS FOR ANY DISPUTES THAT HAVE SURVIVED UNTIL THIS POINT
4 WITH THE EXCEPTION OF, YOU KNOW, THE ONES THAT WE'RE STILL IN
5 THE PROCESSING OF RESOLVING.

6 AND WE BELIEVE AN ADDITIONAL OR MORE COMPLETE MEET
7 AND CONFER WOULD HAVE RESOLVED, ABSENT THE NEED FOR A MOTION
8 SO THE PREMATURE FILING OF THE MOTION HAS RESULTED IN FEES
9 THAT WERE OTHERWISE UNNECESSARY AND ADVERSE AND NOT
10 NECESSARILY PLAINTIFF'S ACTS.

11 THE COURT: I'M GOING TO TAKE A RECESS AND LOOK OVER
12 THESE MATTERS ONE LAST TIME. AND I'LL BE OUT AND ISSUE MY
13 RULING.

14 THANK YOU.

15 (RECESS, 2:46 P.M. TO 3:00 P.M.)

16 THE COURT: ALL RIGHT. THIS IS MY THINKING ON THIS
17 CASE AFTER MUCH CONSIDERATION.

18 I BELIEVE THAT MS. PEARCE HAS ADEQUATELY
19 DEMONSTRATED THAT NORDSTROM DID CONDUCT A VERBAL MEET AND
20 CONFER. I THINK THAT, ADDED TO THE EXTENSIVE WRITTEN
21 CORRESPONDENCE, SATISFIES THE REQUIREMENTS OF THE LOCAL RULES
22 IN TERMS OF DOING A MEET AND CONFER BEFORE SEEKING THE
23 COURT'S INTERVENTION WITH A MOTION.

24 WITH REGARD TO OTHER PROCEDURAL ISSUES THAT WE
25 DISCUSSED, I FIND THAT THE PLAINTIFFS HAVE NOT SHOWN GOOD

1 CAUSE FOR ALL THESE PROCEDURAL DEFECTS; IN PARTICULAR, THE
2 FAILURE TO VERIFY APPROPRIATELY. I JUST DON'T FIND THAT
3 THERE IS A GOOD CAUSE FOR THAT. BUT I DO AGREE WITH
4 MR. KAUFMAN, THAT THAT WOULD NOT WAIVE ANY PRIVILEGES THAT
5 THE PLAINTIFFS WOULD HAVE.

6 BASED ON THE PROCEDURAL ISSUE, I WOULD GRANT THE
7 MOTION TO COMPEL WITH REGARD TO ALL OF THE REQUESTED
8 INTERROGATORIES AND REQUESTS FOR PRODUCTION, WITH THE
9 EXCEPTION OF REQUEST FOR PRODUCTION 22.

10 AND AS TO REQUEST FOR PRODUCTION 22, WHICH IS THE
11 MARONICK SURVEY, LET ME PUT FORTH ON THE RECORD THE WAY I
12 ANALYZE THAT ISSUE.

13 IT APPEARS THAT DR. MARONICK IS NOT GOING TO BE
14 TESTIFYING AT TRIAL AND APPARENTLY WAS ORIGINALLY RETAINED AS
15 A CONSULTING EXPERT AND THEREFORE WOULD NORMALLY BE PROTECTED
16 UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(B)(4)(D).

17 BUT ONCE THAT EXPERT IS PUT INTO THE RECORD, THE
18 CASE LAW STATES THAT THE EXPERT LOSES THAT CONSULTING EXPERT
19 PROTECTION AND BECOMES ESSENTIALLY A TRIAL PREPARATION
20 WITNESS.

21 THIS RULE MAKES SOME PUBLIC POLICY SENSE BECAUSE
22 OTHERWISE IT MIGHT INCENTIVIZE PARTIES TO RELY ON EXPERTS IN
23 THE RECORD FOR PURPOSES OF AVOIDING MOTIONS TO DISMISS OR
24 MOTIONS FOR SUMMARY JUDGMENT THAT THEY KNEW THERE WERE
25 PROBLEMS WITH, AND THEN THEY COULD SIMPLY REMOVE THEM, SAY

1 THEY WEREN'T PLANNING ON RELYING ON THEM AS TRIAL WITNESSES,
2 AND THEREFORE AVOID TURNING OVER UNDERLYING DATA OR
3 INFORMATION THAT MIGHT UNDERCUT THEIR FINDINGS.

4 SO I FIND IN THIS CASE THAT DR. MARONICK HAS LOST
5 HIS ROLE AS A CONSULTING EXPERT; BUT THAT DOES NOT END THE
6 INQUIRY. EVEN IF HE'S CONSIDERED TO BE A TRIAL
7 PREPARATION -- OR TRIAL WITNESS, THE DRAFT -- ANY DRAFT
8 EXPERT REPORTS THAT HE WROTE WOULD BE PROTECTED UNDER FEDERAL
9 RULE OF CIVIL PROCEDURE 26(B)(4)(B).

10 SO I WOULD -- AND COMMUNICATIONS WOULD GENERALLY BE
11 PROTECTED UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(B)(4)(C),
12 WITH THE EXCEPTION OF THREE AREAS OF COMMUNICATIONS THAT ARE
13 EXCEPTED BY THAT RULE.

14 SO AS TO REQUEST FOR PRODUCTION 22, I WILL ORDER
15 THAT ALL OF THE CATEGORIES IDENTIFIED IN THAT REQUEST FOR
16 PRODUCTION BE TURNED OVER. THE ONE EXCEPTION WOULD BE AT THE
17 END, THERE IS A REQUEST FOR ALL COMMUNICATIONS WITH
18 DR. MARONICK. AND I WOULD ORDER THAT THOSE ARE PROTECTED
19 FROM DISCLOSURE, WITH THE EXCEPTION OF COMMUNICATIONS UNDER
20 FEDERAL RULE OF CIVIL PROCEDURE 26(B)(4)(C) AS TO THOSE THREE
21 CATEGORIES.

22 AND THOSE WOULD BE ANY COMMUNICATIONS, NO. 1,
23 RELATING TO COMPENSATION FOR THE EXPERT STUDY OR TESTIMONY;
24 NO. 2, COMMUNICATIONS IDENTIFYING FACTS OR DATA THAT THE
25 PARTY'S ATTORNEY PROVIDED AND THAT THE EXPERT CONSIDERED IN

1 FORMING THE OPINIONS TO BE EXPRESSED; AND, 3, COMMUNICATIONS
2 THAT IDENTIFY ASSUMPTIONS THAT THE PARTY'S ATTORNEY PROVIDED
3 AND THAT THE EXPERT RELIED ON IN FORMING THE OPINIONS TO BE
4 EXPRESSED. BUT OTHERWISE COMMUNICATIONS WOULD BE PROTECTED.

5 AND AS I STATED EARLIER, ANY DRAFT EXPERT REPORTS
6 WOULD BE PROTECTED AS WELL FROM DISCLOSURE. OTHERWISE, I
7 WOULD GRANT THE MOTION TO COMPEL WITH RESPECT TO REQUEST FOR
8 PRODUCTION NO. 22.

9 FINALLY, TURNING TO THE ISSUE OF SANCTIONS. I AM
10 TRYING TO GIVE EVERY, YOU KNOW, BENEFIT OF THE DOUBT HERE TO
11 PLAINTIFF, BUT I HAVE A HARD TIME GETTING PAST THE FACT THAT
12 AT LEAST AS TO THE VERIFICATION WHICH WAS MENTIONED IN
13 CORRESPONDENCE, BOTH OF THE ISSUES, BOTH OF THE DEFICIENCIES
14 WERE MENTIONED IN THE CORRESPONDENCE, AND TO THIS DATE, IT'S
15 STILL INSUFFICIENT AS OF TODAY'S DATE. I HAVE A HARD TIME
16 FINDING THAT THE MOTION WAS NOT -- OR THAT THE OPPOSITION WAS
17 SUBSTANTIALLY JUSTIFIED.

18 SO I WOULD FIND THAT SOME SANCTION OR FEES WOULD BE
19 APPROPRIATE IN THIS CASE. I WILL DISCOUNT IT, HOWEVER, BY --
20 FOR THE REASONS SET FORTH BY MR. KAUFMAN, WHICH I FIND DON'T
21 AMOUNT TO A LEGAL -- LEGAL GOOD CAUSE, BUT DO, I THINK,
22 MITIGATE THE THE PLAINTIFF'S ACTIONS HERE.

23 WHAT I WILL REQUEST, MS. PEARCE, IS THAT NORDSTROM
24 PROVIDE ME A STATEMENT OF THEIR FEES IN CONNECTION WITH
25 BRINGING THIS MOTION.

1 AND HOW MUCH TIME DO YOU THINK YOU'LL NEED TO
2 PROVIDE THE COURT WITH THAT ACCOUNTING?

3 MS. PEARCE: IS ONE WEEK PERMISSIBLE?

4 THE COURT: ONE WEEK WOULD BE FINE. WE'LL GIVE YOU
5 UNTIL CLOSE OF BUSINESS -- UNTIL JUNE 21ST TO FILE THAT WITH
6 THE COURT.

7 AND AFTER RECEIVING THAT, I'LL MAKE A FINAL
8 DETERMINATION ABOUT WHAT FEES WOULD BE APPROPRIATE IN LIGHT
9 OF MR. KAUFMAN'S ARGUMENTS.

10 ANYTHING FURTHER FROM THE PARTIES?

11 MR. KAUFMAN: YES, YOUR HONOR.

12 I PREVIEWED PREVIOUSLY THE ISSUE OF THE MOTION TO
13 QUASH THE SUBPOENA ON CITIBANK. I WAS HOPING TO SECURE A
14 HEARING DATE ON THAT SO THAT WE COULD GO AHEAD AND FILE OUR
15 MOTION AND PROVIDE THAT IN THE NOTICE OF MOTION TO THE EXTENT
16 REQUIRED; OR IF YOUR HONOR PREFERS A DIFFERENT PROCEDURE,
17 LIKE A LETTER PROCEDURE AS WE'VE UNDERTAKEN WITH THIS MOTION
18 TO COMPEL. WE'RE HAPPY TO APPROACH IT IN THAT FASHION AS
19 WELL.

20 THE COURT: YOU BOTH HAVE MADE ME RECONSIDER MY
21 LETTER BRIEFING PROCEDURE. I DIDN'T KNOW HOW EXTENSIVE THAT
22 CAN BE. OR AT A MINIMUM, I MAY HAVE TO IMPOSE PAGE LIMITS OR
23 SOMETHING IN THE FUTURE.

24 I'M NOT -- I'M NOT ADMONISHING EITHER OF YOU ABOUT
25 THAT, BUT YOU CERTAINLY WERE ABLE TO CRAM A LOT OF ARGUMENT

1 INTO THESE LETTERS.

2 I CAN GIVE YOU JULY 26TH AT 2 O'CLOCK P.M. WOULD
3 THAT WORK FOR YOU, MR. KAUFMAN?

4 MR. KAUFMAN: LET ME CONFIRM THAT ON MY SCHEDULE.

5 THE COURT: AND THEN I'LL ASK YOU THE SAME QUESTION,
6 MS. PEARCE, IF YOU HAVE YOUR SCHEDULE AVAILABLE.

7 MS. PEARCE: I BELIEVE THAT WOULD.

8 THE COURT: OKAY.

9 MR. KAUFMAN: THAT WORKS FOR PLAINTIFF'S COUNSEL.

10 THE COURT: OKAY. WE'LL RESERVE JULY 26TH, 2017 AT
11 2 O'CLOCK P.M. FOR THAT HEARING.

12 MR. KAUFMAN: THANK YOU, YOUR HONOR.

13 THE COURT: OKAY.

14 MS. PEARCE: YOUR HONOR, MAY I ASK FOR CLARIFICATION
15 ABOUT THE FEE STATEMENT.

16 DO YOU WANT IT SUBMITTED VIA E-MAIL, AS WE HAVE DONE
17 WITH THE LETTER BRIEFS, OR WOULD YOU LIKE TO HAVE IT PROPERLY
18 FILED?

19 THE COURT: WHY DON'T WE -- THAT'S A GOOD QUESTION.

20 I DON'T KNOW HOW WE GENERALLY DO IT. WE'VE DONE IT
21 A NUMBER OF TIMES, AND ALL I KNOW IS I END UP GETTING THE FEE
22 STATEMENT.

23 I THINK -- I THINK WE TYPICALLY HAVE IT FILED.
24 YEAH, OKAY. SO JUST FILE IT IN NORMAL COURSE.

25 MS. PEARCE: OKAY.

1 THE COURT: YEAH. ALL RIGHT.

2 MR. KAUFMAN: I HAVE ONE LAST POINT OF
3 CLARIFICATION, YOUR HONOR, AND I'M NOT SURE, IT'S PROBABLY MY
4 CONFUSION IN MY NOTES.

5 I JUST WANT TO CONFIRM THAT THE EXTENT OF THE
6 CARVE-OUT FROM REQUEST FOR PRODUCTION 22, THE MARONICK
7 REQUEST, WHETHER IT INCLUDES SOLELY THE COMMUNICATIONS EXCEPT
8 FOR THOSE LISTED IN THE RULE, OR THOSE COMMUNICATIONS AND
9 DRAFT REPORTS WHICH THE COURT ALSO ACKNOWLEDGED ARE
10 PRIVILEGED?

11 THE COURT: RIGHT. SO I'M REQUESTING THAT
12 EVERYTHING THAT'S REQUESTED IN RFP 22 BE TURNED OVER, WITH
13 TWO EXCEPTIONS. ONE IS THE COMMUNICATIONS. THE
14 COMMUNICATIONS SHOULD NOT BE TURNED OVER, EXCEPT TO THE
15 EXTENT THAT I STATED, THOSE THREE EXCEPTIONS IN THE RULE, AND
16 NO DRAFT EXPERT REPORTS SHOULD BE TURNED OVER.

17 MR. KAUFMAN: THANK YOU FOR THE CLARIFICATION, YOUR
18 HONOR.

19 THE COURT: CERTAINLY.

20 MR. KAUFMAN: I'M SORRY IF I MISUNDERSTOOD.

21 THE COURT: NO, NO PROBLEM. I WANT TO MAKE SURE
22 IT'S CLEAR FOR EVERYONE.

23 AND BEFORE I LET YOU ALL GO, IS THERE ANYTHING ELSE
24 THAT I SHOULD BE UPDATED ON IN THE CASE? I REMAIN INTERESTED
25 IN THE CASE OBVIOUSLY AS IT CONTINUES ON AND CERTAINLY IN

1 TERMS OF SETTLEMENT AT SOME POINT AS WELL.

2 SO IF THERE IS ANYTHING ELSE YOU WANT TO LET ME KNOW
3 ABOUT, I'D BE HAPPY TO HEAR IT.

4 MR. KAUFMAN: THANK YOU, YOUR HONOR.

5 MS. PEARCE: NOT AT THIS TIME, YOUR HONOR.

6 THE COURT: OKAY. ALL RIGHT. WELL, THANK YOU VERY
7 MUCH FOR THE ARGUMENT AND THE BRIEFING. AND I GUESS I'LL SEE
8 YOU BOTH AGAIN ON JULY 26TH.

9 MS. PEARCE: THANK YOU, YOUR HONOR.

10 THE COURT: ALL RIGHT. TAKE CARE.

11 MR. KAUFMAN: THANK YOU.

12 (PROCEEDINGS CONCLUDED AT 3:12 P.M.)

13 -- 00000 --

14 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
15 FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
16 ABOVE-ENTITLED MATTER.

17 /S/CAMERON P. KIRCHER 6-22-17
18 TRANSCRIBER DATE

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